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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of MARK and
TERRI BITTENSON.

2d Civil No. B294136
(Super. Ct. No. D360477)
(Ventura County)

MARK BITTENSON,

Appellant,

v.

TERRI BITTENSON,

Respondent.

Mark Bittenson appeals the trial court's order that his martial separation date was May 15, 2013. He claims this date is erroneous and that it is more than two years after he moved out of the family residence. (Fam. Code, § 70, subd. (a).)¹ We affirm.

¹ All further statutory references are to the Family Code.

Facts

Mark and Terri Bittenson were married 26 years and have three children. In October 2010, Terri discovered that Mark was having an affair with a man, Duane. Mark “moved out” on October 23, 2010. He filed a marital dissolution petition more than two years later. He alleged that the marital separation date was October 23, 2010.

Trial was bifurcated to determine the marital separation date. Mark admitted that prior to May 15, 2013, he kept his personal belongings at the house, received mail there, maintained joint accounts with Terri, and paid family residence bills. Mark and Terri also filed joint state and federal income tax returns listing Mark as “Head of Household.” Although Mark did not sleep at the family residence, he was there every day and dined with the family. Mark left each night at 11:00 p.m. to sleep at “Stella’s” place where he rented a room. On Saturdays, Mark and Terri dined out and went to the movies or shopped.

Mark, Terri, and the children continued to go on vacations four times a year. Terri and Mark shared the same bed on boat cruises. Mark begged Terri to stay with him and went to therapy with Terri two to three times a week. Terri believed Mark and Duane were just roommates. But in January 2013, Mark and Duane had a fight and Duane threw Mark’s clothing in front of the family residence. Mark moved back home and begged Terri to renew her wedding vows. He moved out weeks later and filed a marital dissolution petition on March 21, 2013.

On May 15, 2013, Mark and Duane met with Terri and Mark’s oldest daughter, Alissa, at a restaurant. Mark signed a document declaring: “I hereby commit myself to Duane . . . exclusively.” Duane also signed the document, which

memorialized Mark’s willingness to allow Terri alone to determine the timing of the marital dissolution. After the meeting, Mark dismissed the marital dissolution petition without prejudice. But he filed a new petition in December 2013.

Trial Court Ruling

The trial court found that the marital separation date was May 15, 2013 -- the day the separation agreement was signed. The “events . . . up through May 15, 2013 suggests that neither Mark nor Terri intended ‘a complete and final break in the marriage.’ They continued to do many things which they had done before any asserted date of separation, including spending evenings together and taking family trips. The fact that Mark was in a relationship with another person does not necessarily mean the marriage was over.”

Date of Separation

We review for substantial evidence, indulging all legitimate and reasonable inferences to uphold the trial court’s decision. (*In re Marriage of Lee & Lin* (2019) 41 Cal.App.5th 698, 702.) Family Code section 70, subdivision (a) defines “[d]ate of separation” as “the date that a complete and final break in the marital relationship has occurred, as evidenced by *both of the following*: [¶] (1) The spouse has expressed to the other spouse [his or her] intent to end the marriage. [¶] (2) The conduct of the spouse is consistent with [his or her] intent to end the marriage.” (Italics added.) The Legislature amended section 70 to abrogate prior case law (*In re Marriage of Davis* (2015) 61 Cal.4th 846 and *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152) that living in separate residences is an indispensable prerequisite to establish the date of separation. (See § 70, subd. (c).)

Spouses are legally separated for purposes of section 70 if (1) at least one spouse entertains the subjective intent to finally end the marriage, and (2) there is objective evidence of conduct demonstrating that intent. (*In re Marriage of Manfer* (2006) 144 Cal.App.4th 925, 930.) It is a two prong test. (Hogoboom et al., Cal. Practice Guide: Family Law (The Rutter Group 2019) ¶ 8:111.2, p. 8-46.) “Simply stated, the date of separation occurs when either of the parties *does not* intend to resume the marriage *and* his or her actions bespeak the finality of the marital relationship.” (*In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 451.)

Mark may have believed that the 2010 marital rift ended the martial relationship, but his conduct and actions establish a much later date. (*In re Marriage of Davis, supra*, 61 Cal.4th at p. 861 [best evidence of parties’ intent is their words and actions]; *In re Marriage of Hardin, supra*, 38 Cal.App.4th at p. 453.) “The objective test looks at the *parties’* words and conduct to determine their subjective intent; it does *not* ask what *society at large* perceives.” (Hogoboom et al., Cal. Practice Guide: Family Law, *supra*, ¶ 8:111.12, p. 8-47.) If a spouse maintains continued and frequent contacts with the family after moving out of the family residence, the spouses are not separated. (*In re Marriage of Baragry* (1977) 73 Cal.App.3d 444, 447-448.) In *Baragry*, husband moved out and lived in an apartment with his girlfriend, but dined at home three to five times a week, received mail there, took his family to basketball games, sent wife Christmas, birthday and anniversary cards, and filed joint income tax returns with wife. The Court of Appeal held there was no martial separation during that time period. (*Id.* at p. 448.)

The same analysis applies here. Substantial evidence supports the finding that the marital separation date was May 15, 2013. The May 15, 2013 declaration that Mark was committed to his boyfriend, signed in the presence of Terri and Duane is compelling evidence of a complete and final break. (See, e.g., *In re Marriage of von der Nuell* (1994) 23 Cal.App.4th 730, 735-736 [parties' conduct must evidence a complete and final break in the marital relationship]; *In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 657, fn. 2 ["[m]any marriages are 'on the rocks' for protracted periods of time and it may be many years before the spouses decide to formally dissolve their legal relationship"].)

Disposition

The judgment is affirmed. Terri is awarded costs on appeal.

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YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Mark S. Borrell, Judge
Superior Court County of Ventura

Debra A. Opri for Appellant.

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Johnsen for Respondent.